

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9

10 BRETT A. BERGAMO,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Deputy
14 Commissioner of the Social Security
Administration for Operations,

15 Defendant.
16

CASE NO. 2:17-cv-01351-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

17
18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see* Dkt. Entry dated 9/11/2017). This matter has
20 been fully briefed. *See* Dkt. 9, 10. Plaintiff did not file a reply.

21 After considering and reviewing the record, the Court concludes that the ALJ
22 erred when evaluating plaintiff's testimony and allegations. Defendant contends that
23 plaintiff's activities of daily living such as his ability to be independent in his self-care,
24

1 including preparing meals and some household chores; and to drive a car, go shopping,
2 have a savings account, use a checkbook, spend time with others, get along with family
3 friends or neighbors, and get along with various treatment providers “suggest plaintiff’s
4 symptoms are not as limiting as he has claimed.” Dkt. 10, p. 8. However, that is not the
5 proper standard to apply when determining if activities of daily living properly can
6 support the failure to credit fully a claimant’s allegations and testimony.

7
8 Because neither defendant nor the ALJ has directed the Court to any evidence that
9 plaintiff’s activities of daily living are transferable to a work setting, or that they
10 demonstrate a specific inconsistency with plaintiff’s other testimony, the ALJ’s reliance
11 on plaintiff’s activities of daily living when failing to credit fully plaintiff’s allegations
12 and testimony is legally erroneous.

13 Also, because the other rationale relied on by the ALJ cannot be the sole rationale
14 relied on for the failure to credit fully a claimant’s allegations, this matter must be
15 reversed and remanded to the Administration for further administrative proceedings
16 consistent with this Order.

17 BACKGROUND

18 Plaintiff, BRETT A. BERGAMO, was born in 1969 and was 44 years old on the
19 alleged date of disability onset of August 1, 2013. *See* AR. 198-99, 201-09. Plaintiff
20 completed the tenth grade. AR. 46-47. Plaintiff last worked as a painter, painting
21 apartment interiors, but stopped working when he became too sick. AR. 49-53.

22
23 According to the ALJ, plaintiff has at least the severe impairments of “diabetes
24 mellitus; pancreatitis; depressive disorder; generalized anxiety disorder; attention deficit

1 hyperactive disorder (ADHD); alcohol dependence; and opioid dependence. (20 CFR
2 404.1520(c) and 416.920(c)).” AR. 24. At the time of the hearing, plaintiff was living
3 with a friend in his friend’s condo. AR. 62-63.

4 PROCEDURAL HISTORY

5 Plaintiff’s applications for disability insurance benefits (“DIB”) pursuant to 42
6 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42
7 U.S.C. § 1382(a) (Title XVI) of the Social Security Act were denied initially and
8 following reconsideration. *See* AR. 80, 93, 106, 120. Plaintiff’s requested hearing was
9 held before Administrative Law Judge Virginia M. Robinson (“the ALJ”) on July 22,
10 2015. *See* AR. 41-79. On April 6, 2016, the ALJ issued a written decision in which she
11 concluded that plaintiff was not disabled pursuant to the Social Security Act. AR. 19-40.

13 STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
15 denial of social security benefits if the ALJ's findings are based on legal error or not
16 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
17 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
18 1999)).

20 DISCUSSION

21 **1. The Secretary’s decision is not supported by substantial evidence nor 22 was the proper legal standard applied.**

23 Plaintiff contends that the ALJ erred when failing to credit fully plaintiff’s
24 allegations and testimony. *See* Dkt. 9. Defendant contends that plaintiff “has not

1 presented any evidence that could reasonably produce the level of limitation he has
2 claimed.” Dkt. 10, p. 5. However, this is not the proper standard, as although defendant is
3 correct that plaintiff has the burden of producing evidence supportive of his claim, he
4 does not have to produce objective medical evidence demonstrating the specific level of
5 limitation, as described below.

6 The determination of whether or not to accept a claimant's testimony regarding
7 subjective symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;
8 *Smolen, supra*, 80 F.3d at 1281-82 (citing *Cotton v. Bowen*, 799 F.2d 1407-08 (9th Cir.
9 1986)). First, the ALJ must determine whether or not there is a medically determinable
10 impairment that reasonably could be expected to cause the claimant's symptoms. 20
11 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen, supra*, 80 F.3d at 1281-82. Here, the ALJ
12 found numerous severe impairments that reasonably could cause plaintiff's alleged
13 symptoms. *See* AR. 24, 29.

15 Once a claimant produces medical evidence of an underlying impairment, the ALJ
16 may not discredit then a claimant's testimony as to the severity of symptoms based solely
17 on a lack of objective medical evidence to corroborate fully the alleged severity of pain.
18 *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en banc*) (citing *Cotton*,
19 *supra*, 799 F.2d at 1407); Social Security Ruling (“SSR”) 16-3p, 2016 SSR LEXIS 4 at
20 *12-*13 (this Ruling emphasizes that the Administration “will not disregard an
21 individual’s statements about the intensity, persistence, and limiting effects of symptoms
22 solely because the objective medical evidence does not substantiate the degree of
23 impairment-related symptoms alleged by the individual”).
24

1 Here, defendant contends that the ALJ's failure to credit fully plaintiff's
2 allegations and testimony was appropriate because the level of limitation alleged is not
3 supported by the objective medical evidence. *See* Dkt. 10, pp. 5-7. However, as just
4 noted, once a claimant produces medical evidence of an underlying impairment, the ALJ
5 may not discredit then a claimant's testimony as to the severity of symptoms based solely
6 on a lack of objective medical evidence to corroborate fully the alleged severity of pain
7 or other symptoms. *See Bunnell*, 947 F.2d at 343, 346-47 (citing *Cotton*, *supra*, 799 F.2d
8 at 1407); Social Security Ruling ("SSR") 16-3p, 2016 SSR LEXIS 4 at *12-*13.

9
10 The only other rationale presented by defendant in support of the ALJ's rejection
11 of plaintiff's physical and mental complaints is the ALJ's discussion of plaintiff's
12 activities of daily living, which, arguably, was not even relied on by the ALJ when failing
13 to credit fully plaintiff's allegations. *See* Dkt. 10, pp. 5-6. Defendant contends that
14 plaintiff's activities of daily living suggest that "plaintiff's symptoms are not as limiting
15 as he has claimed." *Id.* at 8. As noted, this is not the appropriate standard.

16 Regarding activities of daily living, the Ninth Circuit repeatedly has "asserted that
17 the mere fact that a plaintiff has carried on certain daily activities . . . does not in any
18 way detract from h[is] credibility as to h[is] overall disability." *Orn v. Astrue*, 495 F.3d
19 625, 639 (9th Cir. 2007) (quoting *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.
20 2001)). The Ninth Circuit specified "the two grounds for using daily activities to form the
21 basis of an adverse credibility determination: (1) whether or not they contradict the
22 claimant's other testimony and (2) whether or not the activities of daily living meet "the
23 threshold for transferable work skills." *Orn, supra*, 495 F.3d at 639 (citing *Fair, supra*,
24

1 885 F.2d at 603). As stated by the Ninth Circuit, the ALJ “must make ‘specific findings
2 relating to the daily activities’ and their transferability to conclude that a claimant’s daily
3 activities warrant an adverse determination regarding if a claimant’s statements should be
4 credited. *Orn, supra*, 495 F.3d at 639 (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
5 Cir. 2005)).

6 The ALJ did not make any specific findings relating to the daily activities and
7 their transferability to a work setting. Furthermore, neither the ALJ, nor defendant, has
8 directed the Court to any evidence in the record that plaintiff’s activities of daily living
9 are contradicted by his other allegations or limitations. Therefore, the ALJ erred when
10 relying on plaintiff’s activities of daily living as a basis for failing to credit fully
11 plaintiff’s allegations and testimony regarding his physical and mental complaints. *See id.*

12 For the reasons stated and based on the record as a whole, the Court concludes that
13 defendant’s argument that the ALJ’s failure to credit fully plaintiff’s allegations because
14 of his activities of daily living and the lack of adequate substantiation from the objective
15 medical evidence is not persuasive. The Court also concludes that the ALJ’s error when
16 failing to credit fully plaintiff’s allegations and testimony is not harmless.

17 The Ninth Circuit has “recognized that harmless error principles apply in the
18 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
19 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
20 Cir. 2006) (collecting cases)). The Ninth Circuit has reaffirmed the explanation in *Stout*
21 that “ALJ errors in social security are harmless if they are ‘inconsequential to the ultimate
22 nondisability determination’ and that ‘a reviewing court cannot consider [an] error
23
24

1 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
2 the testimony, could have reached a different disability determination.” *Marsh v. Colvin*,
3 792 F.3d 1170, 1173 (9th Cir. 2015) (quoting *Stout*, 454 F.3d at 1055-56). In *Marsh*, even
4 though “the district court gave persuasive reasons to determine harmlessness,” the Ninth
5 Circuit reversed and remanded for further administrative proceedings, noting that “the
6 decision on disability rests with the ALJ and the Commissioner of the Social Security
7 Administration in the first instance, not with a district court.” *Id.* (citing 20 C.F.R. §
8 404.1527(d)(1)-(3)).

9
10 Here, as noted by the ALJ, plaintiff alleged that his impairments affect his ability
11 to do physical activities [and he] testified that when he last worked, he was only
12 able to work half days per week. He stated that he had to reschedule often due to sickness
13 and abdominal pain.” AR. 28-29 (citations omitted). Fully crediting plaintiff’s allegations
14 likely would lead to a finding of disability, as competitive work generally must be full-
15 time. *See* 20 C.F.R. § 404.1545(b) (“When we assess your physical abilities, we first
16 assess the nature and extent of your physical limitations and then determine your residual
17 functional capacity for work activity on a regular and continuing basis”).

18 For the reasons stated and based on the record as a whole, the Court cannot
19 conclude with confidence “that no reasonable ALJ, when fully crediting the testimony,
20 could have reached a different disability determination.” *Marsh*, 792 F.3d at 1173
21 (quoting *Stout*, 454 F.3d at 1055-56). Therefore, the error is not harmless and this matter
22 must be reversed.
23
24

1 **2. What is the proper remedy?**

2
3 Plaintiff requests that this matter be remanded with a direction to award benefits.
4 Defendant contends that this case is not one of the rare cases in which that would be
5 appropriate.

6 Generally, when the Social Security Administration does not determine a
7 claimant's application properly, "the proper course, except in rare circumstances, is to
8 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,
9 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
10 forth a "test for determining when [improperly rejected] evidence should be credited and
11 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
12 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

13 It is appropriate when:

14 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
15 such evidence, (2) there are no outstanding issues that must be resolved
16 before a determination of disability can be made, and (3) it is clear from
17 the record that the ALJ would be required to find the claimant disabled
were such evidence credited.

18 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

19 Although plaintiff argues that "he is entitled to benefits based upon the current
20 record," plaintiff presents no specific argument as to why this case represents one of the
21 "rare circumstances," in which that would be appropriate. *See Benecke*, 379 F.3d at 595
22 (citations omitted). Plaintiff bears the burden of proving disability within the meaning of
23 the Social Security Act (hereinafter "the Act"). *See Bowen v. Yuckert*, 482 U.S. 137, 140,
24

1 146 n. 5 (1987); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (footnote omitted).


2 The Court will not carry this burden for plaintiff.

3 CONCLUSION

4 Based on the stated reasons and the relevant record, the Court **ORDERS** that this
5 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
6 405(g) to the Acting Commissioner for further consideration consistent with this order.

7 **JUDGMENT** should be for plaintiff and the case should be closed.

8 Dated this 2nd day of April, 2018.
9

10
11 

12 J. Richard Creatura
13 United States Magistrate Judge
14
15
16
17
18
19
20
21
22
23
24